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No. 99-1117

Supreme Court, U.S.
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In the

Supreme Court of the United States

DELBERT HEARD,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was Petitioner denied his Fourteenth Amendment right to present a defense when the trial judge, in accordance with state evidentiary law, refused to admit prior consistent statements made by defense witnesses.

II. Does a criminal defendant have a constitutional right to have the trial judge *sua sponte* give a limiting instruction when "other crimes" evidence is admitted at trial to prove the defendant's intent.

III. The Fourteenth Amendment does not require any particular credibility instruction, and defense counsel did not render ineffective assistance when he failed to request an instruction permitted by state law, but inappropriate given the facts of this case.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PRAYER 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

I. PETITIONER WAS NOT DENIED HIS FOURTEENTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL JUDGE, IN ACCORDANCE WITH STATE EVIDENTIARY LAW, REFUSED TO ADMIT PRIOR CONSISTENT STATEMENTS MADE BY DEFENSE WITNESSES 2

II. THERE IS NO CONSTITUTIONAL RIGHT TO A CONTEMPORANEOUS LIMITING INSTRUCTION GIVEN *SUA SPONTE* BY THE TRIAL JUDGE. THIS IS A MATTER LEFT TO THE SOUND DISCRETION OF THE JUDGE 6

III. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE ANY PARTICULAR CREDIBILITY INSTRUCTION, AND DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE WHEN HE FAILED TO REQUEST AN INSTRUCTION PERMITTED BY STATE LAW, BUT INAPPROPRIATE GIVEN THE FACTS OF THIS CASE 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	PAGE(S)
Chambers v. Mississippi, 410 U.S. 284 (1973)	5, 6
Doyle v. Ohio, 426 U.S. 610 (1976)	4
Herndon v. Georgia, 295 U.S. 441 (1935)	4
Marshall v. Lonberger, 459 U.S. 422 (1983)	5
Rochin v. California, 342 U.S. 165 (1952)	8, 11
Spencer v. Texas, 385 U.S. 554 (1967)	5
Strickland v. Washington, 466 U.S. 668 (1984)	10
Taylor v. Illinois, 484 U.S. 400 (1988)	6
United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971)	8
United States v. Buschman, 527 F.2d 1082 (7th Cir. 1976)	8
United States v. Copelin, 996 F.2d 379 (D.C. Cir. 1993)	8

United States v. Garcia,
848 F.2d 1324 (2d Cir. 1987) 8

United States v. Livingstone,
816 F.2d 184 (5th Cir. 1987) 8

United States v. McClain,
440 F.2d 241 (D.C. Cir. 1971) 8

Constitutional Provisions

U.S. Const. Amend. VI 1

U.S. Const. Amend. XIV 1

Statutes and Other Authorities

E. Cleary, Handbook of Illinois
Evidence (4th ed. 1984) 5

Illinois Pattern Instruction (Crim.)
Nos. 3.14, 3.15 (West 3d ed. 1992) . . . . . *passim*

1 Weinstein, *Evidence*,
¶105[05] (1982) 8

PRAYER

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent respectfully urges this Honorable Court to deny the petition for writ of certiorari to the Illinois Supreme Court.

OPINION BELOW

The Illinois Supreme Court affirmed Petitioner's convictions and death sentence on direct appeal in *People v. Heard*, 718 N.E.2d 58 (Ill. 1999).

JURISDICTION

Petitioner seeks discretionary review by means of certiorari under 28 U.S.C. sec. 1254 (1) (1992).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Delbert Heard ["Petitioner"] seeks *certiorari* review of his three convictions for first degree murder. The evidence at Petitioner's jury trial proved that Petitioner shot and killed his former girlfriend, Nathalie Wilson, Nathalie's boyfriend Kenneth Seals, and Nathalie's cousin, Zita Jones, on November 11, 1992. After accepting the jury's verdicts, the trial judge conducted a bench sentencing hearing, received additional testimony, and sentenced Petitioner to death. The Illinois Supreme Court affirmed judgment of conviction and sentence on direct appeal. *People v. Heard*, 718 N.E.2d 58 (Ill. 1999).

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS NOT DENIED HIS FOURTEENTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL JUDGE, IN ACCORDANCE WITH STATE EVIDENTIARY LAW, REFUSED TO ADMIT PRIOR CONSISTENT STATEMENTS MADE BY DEFENSE WITNESSES.

- In his first argument for *certiorari* review, Petitioner claims the trial judge denied his Fourteenth Amendment right to present evidence when he refused to allow defense counsel to rehabilitate two alibi witnesses. Testifying for the defense, witnesses Alonzo Williams and Tina Coleman testified they had been with Petitioner continuously on the night of the murders. During cross-examination, the State impeached these witnesses by eliciting their admissions that they had not shared this information with police officers, prose-

cutors, the FBI, or the press before they testified at trial. Both witnesses added that they had told defense counsel about this alibi, however. On re-direct examination, defense counsel was unable to elicit additional testimony to the effect that, shortly after the murders, these people had told counsel that they had been with Petitioner on the night of the crimes.[1] The trial judge ruled these were prior consistent statements and, as such, they were inadmissible in evidence at trial.

On direct appeal, the Illinois Supreme Court agreed and explained the state law basis for its decision to affirm Petitioner's conviction. Under Illinois evidentiary law, a party is not permitted to rehabilitate a witness with proof that the witness has made consistent statements in the past. An exception to this rule exists when there is a charge that the witness has recently fabricated his testimony, or that the witness has a motive to testify falsely. In that event, the prior consistent statement is admissible, but only if the witness made the statement before the motive to fabricate arose. *See Heard*, 718 N.E.2d at 59 (summarizing state law). Applying this law to the facts of the present case, the Illinois Supreme Court accordingly ruled that Williams' and Coleman's statements did not fall within this exception, because both of these witnesses had good rea-

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[1] In both the state trial and supreme courts, Petitioner further argued these witnesses should have been permitted to testify that defense counsel had advised them to keep quiet, *i.e.* had instructed them not to share their information with the authorities. Indeed, Petitioner even argued that counsel should have tried to withdraw from the case in order to testify as a witness. *Heard*, 718 N.E.2d at 59. Petitioner has now abandoned those arguments in his present *certiorari* petition.

son to perjure themselves (as a result of their friendship with Petitioner) at both the time of the murders and at trial. *Heard*, 718 N.E.2d at 61.

Petitioner now seeks to challenge this decision in two ways. Citing the *Doyle v. Ohio*, 426 U.S. 610 (1976) line of cases, Petitioner first challenges the relevance of the prosecutor's cross-examination. Whereas Petitioner below complained about defense counsel's inability to *rehabilitate* his witnesses, Petitioner now—in what can only be described as a subtle transmutation of his argument—challenges the manner in which the State *impeached* those witnesses. Silence is ambiguous, Petitioner reasons, so the State should not have been permitted to discredit defense witnesses by proving they had not shared their knowledge with the authorities. (Pet. 9-12).

Petitioner has entirely overlooked the rationale of these cases, however. As *Doyle* itself makes clear, the State may not seek to prove an accused's post-arrest silence, and that silence is ambiguous, because the accused may have chosen to rely on the implicit assurance contained within the *Miranda* warnings that his silence will not be used against him. *Doyle*, 426 U.S. at 618. *Doyle* and its progeny do not even attempt to address the issue at bar, *viz.* whether a party may seek to introduce prior consistent statements of a witness—or, more precisely, under what circumstances a state may constitutionally prohibit him from doing so. Petitioner forfeited *certiorari* review of this relevance-impeachment argument when he did not think to raise it in the state courts. *See generally Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (this Court does not have jurisdiction to

hear a claim that was not seasonably raised in the lower court). In any event, the argument lacks merit.

Equally important, Petitioner has mischaracterized the court's ruling for the argument that was, in fact, pressed and passed on in the court below. The Illinois Supreme Court most assuredly did not hold that defense counsel may never rehabilitate a witness. (Compare Pet. 16, discussing unrebuttable presumptions). That court merely insisted that counsel had a duty to follow the established rules of evidence and trial procedure, including the general prohibition against prior consistent statements, if he wished to do so.[2] In so ruling, the Illinois Supreme Court acted well within the authority vested in it. This Court has repeatedly recognized the respect traditionally accorded the sovereign states in the implementation of their own rules of evidence and procedure. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *See also Marshall v. Lonberger*, 459 U.S. 422, 438 and n.6 (1983) (the due process clause does not allow federal courts to "engage in a finely tuned review of the wisdom of state evidentiary rules") and *Spencer v. Texas*, 385 U.S. 554, 564 (1967) ("it has never been thought that [decisions construing the due process clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure"). Although he has a right to present a defense, including alibi testimony if appropriate,

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[2] Strictly speaking, the issue at bar does not involve the hearsay rule. The Illinois courts have discouraged prior consistent statements in an effort to avoid burdening the trial with excessive collateral issues. E. Cleary, Handbook of Illinois Evidence § 611.13 at 397 (4th ed. 1984). (Compare Pet. Br. 14).

the accused must nevertheless comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *See also Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (despite his Sixth Amendment (compulsory process clause) right to present alibi testimony, the accused does not have any "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence"). Petitioner has failed to identify any manner in which the state courts exceeded their authority in this area, and he has failed to present a constitutional question worthy of *certiorari* review as a result.

II.

THERE IS NO CONSTITUTIONAL RIGHT TO A CONTEMPORANEOUS LIMITING INSTRUCTION GIVEN *SUA SPONTE* BY THE TRIAL JUDGE. THIS IS A MATTER LEFT TO THE SOUND DISCRETION OF THE JUDGE.

In its case-in-chief, the State introduced "other crimes" evidence to prove Petitioner's motive and intent to kill. At the close of all the testimony, the judge included Illinois Pattern Instruction (Crim.) No. 3.14 (West 3d ed. 1992) in his final charge to the jury.[3] Peti-

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[3] That instruction reads: "evidence has been received that the defendant has been involved in offenses other than those charged in the indictment. This evidence has been received on the issues of the defendant's intent and motive and may be considered by you only for that limited purpose. It is for you

(continued...)

tioner does not deny that IPI 3.14 contains an accurate statement of the law. Petitioner now challenges the timing, rather than the accuracy, of that instruction, and he argues the judge should have given this limiting instruction at the time the evidence was received.

On direct appeal, the Illinois Supreme Court agreed that contemporaneous instruction is the preferred practice.[4] *Heard*, 718 N.E.2d at 61. Indeed, there is every reason to conclude that the judge in this case would have given an immediate instruction, if Heard's attorney had so requested.[5] The Illinois Supreme Court refused to reverse Petitioner's convictions, however, reasoning that Petitioner was not unduly prejudiced by the timing of the instruction in his case. *Id.*

Nearly all the state and federal courts agree that the timing of an "other crimes" or other limiting instruction is a matter committed to the sound discretion of the

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[3] (...continued)
to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of intent and motive".

[4] Illinois law does not recognize any absolute right to contemporaneous instruction, however, the matter is entrusted to the discretion of the trial court judge. For this reason, Petitioner cannot successfully claim his attorney rendered ineffective assistance because counsel was unaware of this "undisputed right". (Pet. 24, 26)

[5] The Committee Comments to IPI (Crim.) No. 3.14 (West 3d ed. 1992) recommend that "an oral instruction should be given to explain to the jury the limited purpose of this evidence", unless defendant objects thereto, "at the time the evidence which is the subject of this instruction is first presented to the jury."

trial judge. Although there are "sound reasons for encouraging the practice of giving limiting instructions as the evidence is received", the instruction may be given contemporaneously with the evidence or as part of the court's final charge to the jury. 1 Weinstein, *Evidence*, ¶105[05] at 105-37 (1982). *See also United States v. Buschman*, 527 F.2d 1082, 1085-90 (7th Cir. 1976); *United States v. Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971); *United States v. Livingstone*, 816 F.2d 184 (5th Cir. 1987); and *United States v. Garcia*, 848 F.2d 1324 (2d Cir. 1987) (all reiterating the abuse of discretion rule). Indeed, Petitioner himself concedes this is the "common practice". (Pet. 20).[6]

In this connection, Petitioner has not offered any authority to suggest that contemporaneous limiting instructions are constitutionally required, *i.e.*, that they are so rooted in the "traditions and conscience of the nation as to be ranked as fundamental or implicit in the concept of ordered liberty". *Rochin v. California*, 342 U.S. 165 (1952). Once again, Illinois law fits comfortably within the majority practice, and Petitioner has failed to identify a substantial federal question for review.

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[6] In his attempt to find some authority to the contrary, Petitioner has cited two District of Columbia cases that have been overruled by subsequent decisions. See Pet. 19, 21 citing *United States v. Copelin*, 996 F.2d 379 (D.C. Cir. 1993) and *United States v. McClain*, 440 F.2d 241 (D.C. Cir. 1971).

III.

THE FOURTEENTH AMENDMENT DOES NOT REQUIRE ANY PARTICULAR CREDIBILITY INSTRUCTION, AND DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE WHEN HE FAILED TO REQUEST AN INSTRUCTION PERMITTED BY STATE LAW, BUT INAPPROPRIATE GIVEN THE FACTS OF THIS CASE.

In his final argument, Petitioner again assails his attorney's performance, and he claims his attorney fumbled when he did not ask the judge to include Illinois Pattern Instruction (Crim.) No. 3.15 (West 3d ed. 1992) in the final charge to the jury. Instruction No. 3.15 enumerates a number of factors which the jury may consider when weighing identification testimony.[7] The judge instead used Instruction 1.02, the standard instruction which tells the jurors that they are the sole judges of credibility. That instruction also lists a number of more general matters which the jury may consider.[8]

Once again, Petitioner misapprehends both state and federal law. Contrary to Petitioner's representation, the judge has no duty (even after 1992, when IPI Third was adopted) to give this instruction upon defense request.

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[7] Those factors include, in pertinent part: the opportunity the witness had to view the offender; the witness' degree of attention at the time of the offense; the witness' earlier description of the offender; and the length of time between the offense and the identification. IPI (Crim.) No. 3.15 (West 3d ed. 1992).

[8] Under IPI No. 1.02, the jury may take into account the witness' ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony in light of all the evidence in the case.

(Compare Pet. 29). If the judge feels that Instruction 3.15 will be helpful, he has discretion to give the instruction. At no time is he required to use it, however. Indeed, he must not use it unless some extraordinary aspect of the case renders it appropriate. *See* Committee Comments, Illinois Pattern Instruction (Crim.) No. 3.15 (West 3d ed. 1992).

Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the Illinois Supreme Court decided that Petitioner could not show resulting prejudice. *Heard*, 718 N.E.2d at 86-87. At no time did TQ give a prior, inconsistent description or identify anyone other than Petitioner, as counsel now implies. (Pet. 28). Nor was there any real reason to doubt the accuracy of her identification. TQ knew Petitioner because he was her mother's former boyfriend, and Petitioner had lived with TQ and her mother. Indeed, the landlady, to whom TQ had run for help, heard TQ say "why did Heavy shoot my mama?" on the night of the murders. When police officers took TQ with them to look for Petitioner, TQ crouched down in the car and said "he gon see us" as they passed Petitioner's home. *Heard*, 718 N.E.2d at 67. The only troublesome aspect was TQ's unwillingness to make an identification for 14 months, and that fact was adequately explained, as the Illinois Supreme Court noted, by the fact that a 10-year old child who had witnessed 3 murders would initially be reluctant to talk about the incident. *Heard*, 718 N.E.2d at 66.

Because Petitioner cannot show resulting prejudice, he cannot prove ineffective assistance of counsel or a Sixth Amendment violation. Moreover, for the reasons enumerated in Argument II to this Response, Petitioner has not demonstrated that the Fourteenth Amendment

requires an particular credibility instruction. *See generally Rochin v. California*, 342 U.S. 165 (1952) (stating the applicable standard). Due process of law was satisfied in this case when defense counsel was able to cross-examine TQ at trial, and when the judge instructed the jurors generally on the topic of witness credibility. There is no basis for *certiorari* review in this case.

CONCLUSION

Because Petitioner has not presented any federal constitutional question worthy of review, Respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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